No. 2292.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC TOW BOAT COMPANY, a Corporation of the State of Washington, Owner of the Tug "Argo,"

Appellant.

vs.

IVOR NORDSTROM, Intervener,

Appellee.

"IN THE MATTER OF THE PETITION OF THE PACIFIC TOW BOAT COMPANY, a Corporation of the State of Washington, Owner of the Tug "Argo," for Limitation of Liability."

BRIEF FOR APPELLEE.

WALTER S. FULTON,
CALVIN S. HALL,
HOWARD G. COSGROVE,

Proctors for Appellee.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellant, at the time of the injury to appellee, was the owner and operator of a large line of tugs on Puget Sound, one of which was the Argo. Appellee, Ivor Nordstrom, who was then twenty years of age and inexperienced as marine fireman, entered the employ of appellant October 15th, 1910, on the Argo, and his duties consisted of fir-

ing and oiling. He was employed by H. S. Studdert who was at that time and had been for several years Port Engineer of appellant, whose duty it was, among other things, to look after the engine rooms of appellant's and particularly in and about the place said appellee was injured.

At that time Studdert, in addition to being Port Engineer, one of whose duties was to hire the employees of appellant, was running an employment office, and it was at said employment office appellee was hired and charged a fee by Studdert for the job. Page 162.) He made no particular investigation as to Nordstrom's qualifications for the work (page 167) and, no doubt, was more interested in the fee he was to get from Nordstrom for hiring him than to see that appellee was experienced in the duties of fireman or instructing him as to his duties.

Appellee continued to work for appellant on the Argo as fireman and oiler until the evening of November 22d, 1910, when on the return trip from Richmond Beach near Seattle and while he was oiling the machinery, he slipped, his left leg going against the lower part of the guard between the passageway and the crank pit. The bottom of the guard being unfastened gave way, allowing his foot to go into the crank pit. He attempted to withdraw his foot but the guard cut into it and held it there until the engine was stopped, when by pressing with his right foot against the bottom

of the guard, he succeeded in releasing his left foot and pulled it out.

When his foot went into the crank pit it was struck by the revolving cranks and because of the fact that it was held by the guard pressing against it, was pulled further under the revolving cranks, was smashed and crushed so badly that after an unsuccessful effort of seven or eight weeks to save it, the foot and part of the leg had to be amputated.

This guard was about sixteenth or eighteenth inch sheet iron and separated the passage way from the crank pit. It was ordered put there about four years before by one Chesley, who was then manager of appellant and who continued to be manager until sometime in August preceding the injury to Nordstrom. It was put there as a guard for the protection of the employees using the passageway, to prevent them from slipping into the crank pit.

This guard was on the inside of the column, that is, the side toward the crank pit and revolving cranks, was fastened at the top to the standards by "U" bolts but was unfastened at the bottom. Immediately after the injury to Nordstrom, the guard was changed by the Port Engineer to the outside of the column, was bolted at the top and fastened at the bottom and has been in that condition ever since.

In April, 1911, an action at law was commenced in the Superior Court of the State of Wash-

ington for King County by the appellee against the Pacific Tow Boat Company for damages for the injury received, issues were joined and the cause was set down for trial for November 9th, 1911. On November 6th, 1911, the Pacific Tow Boat Company filed its petition in the District Court for limitation of liability and an order was entered restraining Nordstrom from proceeding with the trial in the state court and monition issued. The vessel was appraised at $5,000.00, but after exceptions were taken to the appraisal, a stipulation was entered into, stipulating that the value of the vessel was $8,000.00. Appellee filed his claim and answered the petition, testimony was taken and final hearing was had November 29th, 1912, briefs were submitted, after argument, and the matter was taken under advisement by the District Judge. On March 1st, 1913, memorandum decision was filed and on March 3d, 1913, final decree was entered and filed.

POINTS AND AUTHORITIES.

This guard was constructed at the direction of the manager of appellant for the safety of the employees, including the fireman using the passageway around the engine.

Apostles, pp. 57-58-59-67.

A good and sufficient guard was necessary in order to protect the employees using the passageway from falling or slipping into the crank pit.

Brownfield, pp. 49-50.
Chesley, pp. 57-58.
Ossinger, pp. 95-96.
Wright, p. 106.

Appellant's expert witnesses admitted that it would be safer for the men if a proper guard was there.

Lovejoy, p. 182.
Ramwell, p. 191.
Primrose, p. 222.

This guard was defective because it was placed on the inside of the columns, that is the side toward the crank pit instead of the outside, and was not fastened or secured at the bottom.

Brownfield, p. 35.
Studdert, pp. 156-166-167.

Second, because it was of too light material.

Studdert, p. 156.
Anderson, pp. 201-202.
Primrose, pp. 216-221.

This guard had remained in the same defective condition for about four years prior to the accident.

Studdert testified that he had been port engineer about three years at the time of the accident and it had not been moved during that time; when he went to work for the company he inspected this guard (p. 154), and it was in identically the same condition when appellee was hurt as it was ever since the vessel was built (pp. 163-167); that it had never been moved prior to the accident (p. 167) but he did change it shortly after the accident to the outside of the columns and fastened the

bottom down by a board (p. 158).

Appellee did not know of the defective condition of the guard (pp. 88-93) and the defective condition was not so apparent that he was bound to know of it and therefore assume the risk (p. 38).

The vessel and its owner are liable to appellee in damages on account of failure of those representing the vessel to exercise reasonable care to make said guard safe. The law has been definitely settled by the Supreme Court of the United States in "The Osceola," 189 U. S. 158; 47 Law Ed. 760, where it is stated:

"Upon a full review, however, of all English and American authorities upon these questions, we think the law may be considered as settled upon the following proposition: * * * That the vessel and her owner are both by English and American law liable to an indemnity for injuries received by seamen in consequence of unseaworthiness of ship or a failure to supply and keep in order the proper appliances appurtenant to the ship."

We could cite a great number of cases as to the duty of the master to furnish a safe place and safe appliances and by proper inspection to see that they are kept safe, but this court has decided the law on these points in so many instances that we only call the court's attention to one of its latest decisions, *Alaska Pacific Company vs. Egan*, 202 Fed. 867.

ARGUMENT.

There are no principles of law more firmly established than that it is the master's duty to furnish his servant a safe place within which to work; to furnish safe and proper appliances and by proper inspection see that they are kept safe, and he cannot delegate these duties to some one else and thereby relieve himself from liability for their non-performance or negligent performance.

In the case at bar, the master acting through its manager recognizing that the safety of the men using the passageway required a proper and sufficient guard between the passageway and the crank pit delegated the duty of installing such a guard to its servants. An insufficient guard improperly installed was the result and appellee was injured thereby. We submit that this renders appellant liable. Furthermore, appellant delegated the duty of inspecting the engine room and appurtenances which included this guard and remedying any defect in either to its servant, the Port Engineer, and a reading of his evidence shows that he was negligent in the performance of this duty for one of two things must be true. Either he did discover the defective condition of the guard and failed to remedy it as his testimony shows, or he did not discover it when by the exercise of reasonable diligence he could have discovered. In either case his negligence is the negligence of the master and renders it liable.

Appellant in the trial in the District Court attempted to rely on the defense that this guard was installed as such guards are usually installed on Puget Sound and therefore even if not proper it was not liable. In answer to this we wish to call the court's attention to the fact that in no single instance was it proven that such a guard as this, placed on the inside of the columns unfastened at the bottom, is in use on any boat on the Sound. The testimony of appellant's witnesses showed that when a guard is placed on the inside of the columns it is fastened both at the top and bottom. It is true that some of appellant's witnesses testified that in one or two instances they had seen boats with no guards at all. Even if this were a fact, would that establish a custom, or if it did, would the fact that one or a dozen tow boat owners were guilty of negligence in this particular relieve appellant when it knew and recognized that the safety of the men required a good and sufficient guard there but did not see that such a guard was properly installed and maintained? We think not. Negligent performance of a duty will never establish a custom.

In appellant's brief, however, this defense has in a measure been abandoned and it now urges on page 14 of its brief that this guard was all right; that "the most that can be truthfully said in condemnation of the guard in question is that it was not fastened at its bottom edge or that it was misplaced by being inside instead of the outside of

the columns," and that this was negligence of the officers in charge of the boat and no liability attaches to the vessel or its owners. We do not see how appellant can honestly take this position in the face of the testimony of its own witnesses by whose evidence it is certainly bound. Ramwell testified, "He didn't think it was intended as a guard because if he wanted to keep somebody from falling in he would put something stronger there for a guard" (p. 193), and Anderson said, "if it was put there as a guard it would be a foolish thing to have there because it was too light" (pp. 201-202), and Primrose, who swore he would not consider it a guard because it was not heavy enough ((pp. 219-220), and "if it was put there as a guard a man did not know his business in putting it there" (p. 221).

In this connection appellant likens it to a hatch cover leading the court to believe that it was removed and replaced daily. This is not true for the testimony shows of but one single instance when this guard was removed and that was after the accident when Studdert, port engineer, changed it from the inside to the outside of the columns and fastened it at the bottom with a board.

By the way, he does not give his reason for making the change then, but certainly not because it would better serve its purpose as a "splash guard," for he, together with all other of appellant's witnesses, swore that a splash guard should be on the inside of the columns and not the outside,

particularly on the Argo.

The evidence further shows that when appellee's foot went against the guard, the bottom being unfastened gave way allowing his foot to go into the crank pit where it was struck by the revolving cranks. On attempting to withdraw it the guard cut into his leg preventing its withdrawal while the cranks striking it pulled it in further and further, smashing and crushing it inch by inch nearly to the knee. The only way he got it out was by stopping the engine and pressing the bottom of the guard with the other foot thereby releasing it. We submit that the District Court was right when it stated that it was a "trap."

At this time we desire to call the court's attention to appellant's brief in two or three particulars which we believe are unworthy of its distinguished author. On page six of said brief it is stated that, "It is a physical impossibility for the injury to have happened in the manner described by him (appellee) and his testimony being unbelievable, there is no evidence to support a decree in his favor." This is the first time either in the evidence or in the oral argument at the final hearing that a doubt has been intimated as to the truthfulness of appellee's evidence. There never was any question in the minds of those upon the boat that it happened just the way appellee said it did. We ask this court to read his evidence carefully and see if there is one place in it that raises the court's suspicion as to its truthfulness. Being of foreign

birth and not having been in this country long enough to learn the language, appellee is not a fluent talker but neither on direct or cross examination does he attempt to evade any question. His testimony is clear and convincing. Proctor for appellant says that it is a physical impossibility for the accident to have happened in the way appellee testified that it did, but gives no explanation why it is a physical impossibility, neither does he attempt to state how it could have happened in any other manner than that related by appellee. Surely among the array of witnesses for the appellant, anxious as they were to testify in its behalf, there was one with mind sufficiently brilliant to have discovered that it was a physical impossibility for it to have so happened.

On pages 8 and 9 of appellant's brief the District Judge is accused of not understanding the engine or equipment of the engine room and accepting conclusions of witnesses that there was a defect notwithstanding an overwhelming preponderance of contradicting evidence. Then follows an exaggerated picture of a fantastic flap that proctor for appellant thought probably existed in the imagination of the District Judge upon which he based his decision. What is there about this engine room and guard that would make it difficult for the District Judge to understand it from a reading of the evidence and where is the overwhelming preponderance of contradicting evidence? A reading of the testimony discloses that

the evidence does describe the engine and equipment of the engine room and does point out the defects in the guard explicitly.

On page 12 of said brief fault is found with appellee's witness, Brownfield, because he did not report the defective guard and for that reason his evidence should not be considered but the evidence of Studdert, port engineer, who as proprietor of the Eagle employment office, took a fee from appellee for giving him a job, who knew of the guard's defective condition for three years and whose duty it was to remedy it, but who neglected to do so is quoted with approval by appellant in many instances.

If Chesley, former manager of appellant, at whose direction this guard was installed, is a "stultified" witness as said on page 14 of appellant's brief, how about McNealy, manager of appellant at the time appellee was injured who took Chesley's place and who "didn't really know whose duty it was to see that the engine room was safe" (p. 125), who "did not know whether there was a guard around the crank pit or not or whether there was one there now" (p. 127), and who "depended upon the government inspector to find out whether there is anything wrong with the boat." Mr. Chesley told the truth as a reading of his testimony will show. The company that he is interested in owns $80,000.00 worth of the stock out of a capital of $125,000.00, and he will have to bear a greater portion of the judgment than any of ap-

pellant's witnesses.

However, we can overlook the proctor for appellant in his attempt to bolster up a weak case by saying that the testimony of appellee is "unbelievable," that Chesley is a "stultified" witness, that Brownfield's evidence lacks "probative force," that the District Judge did not know what he was talking about, but we cannot overlook one fact, and that in the attempt to prejudice this court he has included in his brief a distorted photograph of what purports to be the engine room of the Argo but which shows the floor not to be horizontal and the man leaning back in an unnatural position, a photograph not offered nor received in evidence and not a part of the record in this case. We do not believe this court will consider the same and will not commend the manner in which it is sought to be brought before it.

In considering the amount of damages allowed instead of being too great we urge that it is too small. Appellee was 20 years of age when injured, a bright, active boy earning good wages. His leg was so smashed and bruised that though the doctor tried from the date of the accident to February following to save it he could not but had to amputate it. After the amputation appellee was on the operating table four or five times and that he suffered a great deal of pain (pp., 76-77) ; he was in the hospital altogether nearly eight months (p., 82) and at the time of giving his first testimony about fourteen months after the accident he was

still unable to work, and suffered a great deal (p., 83), and at the last time he testified which was nearly two years afte rthe accident he was still unable to wear a wooden leg but had to use crutches (p., 208). There is no contributory negligence charged or proven to reduce the amount of damages and there are no facts favorable to the appellant tending to mitigate the damages. The expense for medical attention and hospital charges has been borne by the United States or by appellee.

The District Court realizing that he could not wholly compensate Nordstrom for the loss he had sustained, for the pain and suffering that he has undergone and will undergo allowed him $5,000.00 wtih interest from date of the accident. It is our understanding of the law that when limitation of liability is allowed it dates back to the time of the accident and all claims are allowed as of and bear interest from that date. It would be unfair to do otherwise. Petitioner in this case waited for nearly a year after the accident before filing its petition and eight months after suit was commenced in the state court. The date of trial was only two days off, witnesses had been subpoaened and the case had been fully prepared for trial. Interest was allowed as part of the claim. The District Court might have computed the interest and added the same to the five thousand dollars making one sum allowed. No fault could then have been found with it. Appellant did not call the District Court's attention to its error in allowing interest

and thus give it a chance to correct it if error was committed. This court has power to increase the amount of damages allowed and we respectfully ask this court if interest be disallowed that a sufficient sum be added to the damages to equal it.

Respectfully submitted,

WALTER S. FULTON,
CALVIN S. HALL,
HOWARD G. COSGROVE,
Proctors for Appellee.